Supreme Court, U.S.
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No. 00-154

IN THE

Supreme Court of the United States

WOODROW W. DAWAHARE,

Petitioner,

v.

ADAM A. SPENCER,
DEAN WITTER REYNOLDS, INC.
and SMITH BARNEY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DEAN WITTER REYNOLDS, INC.

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

In addition to the parties listed by Petitioner, it should be noted that subsequent to the initiation of this proceeding, Dean Witter Reynolds, Inc. merged with Morgan Stanley, Inc. and the name is now Morgan Stanley Dean Witter, Inc.

Dean Witter Reynolds, Inc. is a merged entity of Morgan Stanley Dean Witter, Inc. There are no publicly held companies owning 10% or more of the corporate stock of Morgan Stanley Dean Witter, Inc.

TABLE OF CONTENTS

	Page
Parties to the Proceeding and Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	iii
Counterstatement of the Facts	1
Reasons for Denying the Writ	5
I. The Petition Fails To Set Forth Reasons For Enlarging Judicial Review Of Arbitration Decisions.	5
II. There Is No Evidence Of Partiality.	7
III. There Is No Evidence Of A Manifest Disregard Of Law By The Arbitration Panel.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson, Inc. v. Horton Farms, Inc., 166 F.3d 308 (6th Cir. 1998) 8

Carrs Fork Corp. v. Kodak Min. Co., Ky., 809 S.W.2d 699 (1991) 7

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) 6

Consolidation Coal Co. v. Local 1643, United Mine Workers of Am., 48 F.3d 125 (4th Cir. 1995) ... 8

McIlroy v. Painewebber, Inc., 989 F.2d 817 (1993) 9

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros, 70 F.3d 418 (6th Cir. 1995) 9

Robbins v. Day, 954 F.2d 679, *cert. denied*, 506 U.S. 870, 113 S. Ct. 201, 121 L. Ed. 2d 143 (11th Cir. 1992) 8

Smith v. C.I.R., 800 F.2d 930 (9th Cir. 1986) 9

Steeleworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960) 6

Cited Authorities

Page

Tinsway v. Merrill Lynch & Co., 685 F. Supp. 576 (S.D.N.Y. 1987) 7

United Paperworkers v. Misco, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) 5

Other Authority:

Section 10323 of the Code of Arbitration Procedure 8

COUNTERSTATEMENT OF THE FACTS

The petitioner in his Statement of the Case omits many facts that would bear on the issues if the Petition were granted. The respondent ("Dean Witter") points out the omitted facts in the Counterstatement of the Facts.

Petitioner has long been a successful businessman and speculative investor. He has for more than twenty years invested in equity stocks through dealings with brokers. At the arbitration hearing it was established that he had engaged in transactions with at least sixteen brokerage firms. He was a speculative investor who bought and sold gold and penny stocks, engaged in short selling and options and invested in thoroughbred horses and second mortgages. Petitioner's federal income tax returns for the years 1990-94 were introduced into evidence before the arbitration panel and in addition to showing transactions in penny stocks, gold stocks and options showed an annual adjusted gross income of more than $250,000 per year. Petitioner has complained of and proceeded against other stockbrokers in the past when his investments have had shown losses.

Petitioner met Adam Spencer ("Spencer"), a broker for Shearson, through a "cold call" from Spencer to petitioner. Sometime thereafter petitioner opened accounts through Spencer at Shearson. Smith Barney acquired Shearson and petitioner continued transacting business through Spencer. The accounts were very active with frequent communications between petitioner and Spencer. While Spencer was acting as petitioner's broker, petitioner commenced engaging in short transactions. A short transaction was where the investor hoped that the price of the stock decreased because he would then make a profit at the time he closed out the transaction.

This investment strategy was not inconsistent with the past speculative ventures by petitioner. Initially he made substantial amounts of money through short transactions.

Petitioner developed a close personal relationship with Spencer. He traveled to New York and had dinner with Spencer. Spencer traveled to Lexington, Kentucky on two occasions, February and August, 1994, and stayed at petitioner's home while in Lexington. Petitioner's family members were present when petitioner entertained Spencer.

Spencer's supervisor, in the ordinary course of business, checked with petitioner in July, 1994 about petitioner's accounts and found petitioner well satisfied with Spencer's services.

When Spencer came to Kentucky to visit petitioner in August, 1994 he advised petitioner and petitioner's son, Richard Dawahare, a lawyer, that he, Spencer, was moving to Dean Witter. Petitioner agreed and the account transfer was completed on October 3, 1994. In addition, Richard Dawahare, a lawyer, business executive and trustee of the Dawahare Family Trust, transferred trust assets to Dean Witter for Spencer to manage. Dean Witter recruited Spencer on the advice of a broker known to Robert Berg, Manager of the Dean Witter facility at Mt. Kisco, New York. Spencer explained the business that he was doing with the petitioner and further believed he was on the verge of attracting significant business from Dawahare family members and friends. Exhibit 98, a Dean Witter new account form for petitioner, dated September 8, 1994, indicated annual income of $100,000, $3.5 million in net worth, $2 million in liquid net worth with investment objectives in order of priority being speculation, capital appreciation, aggressive income,

income. Spencer brought with him a new account Smith Barney document showing Dawahare Associates, Inc., c/o W.W. Dawahare, petitioner, had a net worth of $15 million. The petitioner signed a document with Dean Witter giving petitioner margin privileges. This gave him the ability to borrow against the accounts in his portfolio and to deal in short transactions. There were no complaints made to Robert Berg or anyone at Dean Witter concerning the conduct of Adam Spencer until January 16, 1995 when Mr. Berg received a fax copy of a letter dated January 13, 1995 from Richard Dawahare. This letter made reference to an earlier guaranty letter which Adam Spencer had sent to petitioner in December, 1994. Such a guaranty letter was contrary to the policy of Dean Witter. Dean Witter terminated Spencer upon being advised of the complaint of Dawahare and the letter of guaranty.

Sometime after Dean Witter became aware of the guaranty letter, it was advised that Richard Dawahare had held a power of attorney for petitioner since November 19, 1993. The existence of the power of attorney had not been made known to Smith Barney or Dean Witter. The power of attorney did not restrict the ability of the petitioner to deal with brokers. Petitioner had continued to deal with Arnie Weslen of Prudential Securities, a long-time financial adviser, and as late as September-December, 1994 was involved with transactions with First Hanover Investment Company.

It was long after Spencer was terminated that Richard Dawahare advised Dean Witter that petitioner was mentally impaired. Doctor Knox, who first saw petitioner on March 14, 1994, recorded in his report of January 30, 1996, an exhibit made a part of the record before the arbitrators, that

Richard Dawahare did not become aware of Dr. Knox's Alzheimer diagnosis until the summer of 1995. Dr. Knox testified that petitioner's condition was gradually progressive dementia, but that petitioner had no problem with his finances or real estate ventures. Dr. Knox testified that on August 1, 1994 he recorded that petitioner's memory had improved significantly since the last visit. Judy Dawahare, wife of petitioner, testified that petitioner was one of the Dawahare brothers who had a company with retail stores throughout Kentucky and in several states. Petitioner was active in setting up three stores in Lexington, Kentucky. He also managed a very small estate into a large estate. She testified that he went to work every business day and was still so doing at the time of the arbitration hearing. She testified that she had a Masters Degree as a psychiatric clinical nurse specialist and despite the fact that she knew of Dr. Knox's diagnosis of early stages of Alzheimer in August of 1994 that she never told anybody at Smith Barney of the diagnosis.

Richard Dawahare testified that in February or March, 1994, he talked to Arnie Weslen, the Prudential broker, about the volatility in his father's account at Smith Barney. Despite gaining information about the short positions and the risk accompanying such positions, he took no action and did not discuss the account with his father. Richard Dawahare testified that he felt his father was competent to understand the statements sent by Smith Barney and the net equity of the account. He stated that the first time that he looked at his father's monthly statements was in December, 1994. Tara Hellard, secretary for petitioner, testified that petitioner received statements of daily trades and monthly statements from the brokerage firms. She said he had so many statements coming in each month that she put them in one summary sheet so he could look at them and know what he had without

having to go through ten or twelve different company statements. About 1994 petitioner was trustee of the S.S. Dawahare estate and no one made any effort to remove him as trustee. The estate owns a shopping center and other property.

REASONS FOR DENYING THE WRIT

The petitioner's argument for granting the writ assumes "inadequacies of the arbitration panel." Petition for Writ of Certiorari, p. 7. Petitioner's claim of inadequacies is nothing more than a dissatisfaction with the amount of damages awarded him.

I.

THE PETITION FAILS TO SET FORTH REASONS FOR ENLARGING JUDICIAL REVIEW OF ARBITRATION DECISIONS.

There is no valid reason set forth in petitioner's Petition for Writ of Certiorari or based on the facts of this case to extend judicial review of arbitration awards. In *United Paperworkers v. Misco*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987), this Court in speaking about arbitration in a labor management dispute said:

> . . . In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.

Id. at 484 U.S. 36.

The Court, citing *Steeleworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), stated:

> . . . The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award.

Id.

The same statement is applicable to the federal policy for settling claims between stock brokerage firms and their customers.

The petitioner's reliance on *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) in support of his argument that judicial review of arbitration decisions should be enlarged is not well founded. There it was revealed after the award that the arbitrator had earned approximately $12,000 in fees for providing services to one of the parties to the arbitration over a period of four or five years prior to the arbitration. Four justices said that courts should be even more scrupulous to safeguard the impartiality of arbitrators than judges and that the effectiveness of the arbitration process would not be hampered by the requirement that arbitrators disclose to parties any dealings which might create an impression of possible bias. Justice White with Justice Marshall concurring joined in the majority opinion but stated that the Court did not decide that arbitrators were to be held to the standard of decorum for Article III judges. The opinion observed that it was enough for present purposes to hold, as the Court did, that where the arbitrator has a substantial interest which has done more than a trivial business with a party that fact must be disclosed. Here the petitioner does not contend the arbitrators had any interests showing possible bias.

The case of *Tinsway v. Merrill Lynch & Co.*, 685 F. Supp. 576 (S.D.N.Y. 1987) is a failure of disclosure case where Merrill Lynch admitted it knew the tenuous position of Mr. Tinsway's investments and did not disclose the circumstances to him. There are no such facts in this case. Here the petitioner was almost daily in contact with the broker Spencer and received daily and monthly accounting of all trades on his behalf.

The case of *Carrs Fork Corp. v. Kodak Min. Co., Ky.*, 809 S.W.2d 699 (1991) is readily distinguishable. The law under which the case was decided was Kentucky statutory law pertaining to arbitrations. Kentucky Revised Statutes 417.018. Further, the Court pointed out that under Kentucky law there exists ". . . the legal maxim that the law abhors a forfeiture of a coal lease." *Id.* at 701. The arbitration decision was set aside because of the failure of the panel to follow the law of Kentucky.

None of the cases cited by petitioner support extending judicial review of arbitration decisions in cases where the customer of a brokerage company is simply dissatisfied with the arbitrator's award.

II.

THERE IS NO EVIDENCE OF PARTIALITY.

As to the issue of partiality, there is nothing in the record to indicate such. The District Judge pointed out there is nothing in the record to indicate that petitioner raised the issue during the arbitration procedure or alleged any "facts supporting bias which surfaced after the award, other than his displeasure with the award." District Court Opinion &

Order and Judgment, Appendix to Petition for Writ of Certiorari, p. 17a. Petitioner has not and cannot point out "specific facts that indicate improper motives on the part of the arbitrators." *Anderson, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998), quoting *Consolidation Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir. 1995). In *Robbins v. Day*, 954 F.2d 679, *cert. denied*, 506 U.S. 870, 113 S. Ct. 201, 121 L. Ed. 2d 143 (11th Cir. 1992), the Court held that the arbitration statute does not allow an award to be vacated solely on the basis of error of law or interpretation, but requires something more, such as misconduct pertaining to proceedings on the part of the arbitrators or parties. Here there is no showing of misconduct pertaining to the proceedings on the part of the arbitrators or parties.

III.

THERE IS NO EVIDENCE OF A MANIFEST DISREGARD OF LAW BY THE ARBITRATION PANEL.

Petitioner also claims a manifest disregard of law because the arbitration panel did not award him an amount equal to his claimed loss. Petitioner bases his loss claim on the testimony of his claimed expert witness, Dr. Dennis Officer. The District Court found that Dr. Officer's testimony "was significantly impeached on cross examination." District Court Opinion & Order and Judgment, Appendix to Petition for Writ of Certiorari, p. 16a. Section 10323 of the Code of Arbitration Procedure (NASD Regulations) states: "The arbitrators shall determine the materiality and relevance of any evidence proffered and shall not be bound by rules governing the admissibility of evidence." The arbitrators as

the triers of fact could accept all, part or none of Dr. Officer's testimony. *Smith v. C.I.R.*, 800 F.2d 930 (9th Cir. 1986). It appears obvious that the arbitration panel did not give much weight to the damage testimony of Dr. Officer.

Further, there was evidence showing the petitioner maintained substantial control over his accounts with the brokerage firms throughout the relevant time period and thus was accountable for losses caused by his trades. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995), the Court said that an arbitration decision "must fly in the face of established legal precedent" for there to be a finding of manifest disregard of the law. Petitioner has failed to make such a showing. A similar challenge to an arbitration award was made in *McIlroy v. Painewebber, Inc.*, 989 F.2d 817 (1993) where the arbitrators award was $40,875 on a claim of $1,033,750. The Court rejected the investor's argument that the award was the product of a gross mistake as to imply failure to exercise honest judgment. The Court pointed out that the investor offered no evidence of a gross mistake save the discrepancy between his claim and the award. The petitioner here offered no evidence of partiality or manifest disregard of the law other than the discrepancy between his claim and the award.

In summary, the facts show neither evidence of partiality nor a manifest disregard of the law by the arbitration panel. The petitioner chose to proceed to arbitration, raised no questions of partiality during the arbitration proceedings or in any post arbitration proceeding before the arbitration panel. In fact, during petitioner's counsel's closing argument he stated: "So, I would like to give you a nice clean theory for allocating this award among the respondents, and I'm afraid I can't do that. I'm going to leave it to your wisdom."

Court of Appeals Opinion, Appendix to Petition for Writ of Certiorari, p. 9a. The Court of Appeals stated: "Dawahare cannot rely upon the wisdom of the decision makers without citing any rule of law to support his damages claim and then later argue that the arbitrators disregarded the law. *Id.*"

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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